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In The

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, Attorney General,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE PROGRESSIVE INTELLECTUAL PROPERTY LAW ASSOCIATION AND THE UNION FOR THE PUBLIC DOMAIN IN PARTIAL SUPPORT OF PETITIONERS

PROFESSOR MICHAEL H. DAVIS, ESQ.
Counsel of Record
CLEVELAND STATE UNIVERSITY
College of Law
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-2228

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INTERESTS OF *AMICI CURIAE**

Amici are two non-profit public-interest organizations. The Progressive Intellectual Property Law Association (PIPLA), is a Cleveland organization whose membership consists of lawyers, law students, professionals, and laypeople interested in protecting and supporting the public interest in intellectual property concerns.[1] PIPLA was founded in 1990, in response to the AIDS crisis and the relationship between pharmaceutical patents and the public interest. PIPLA has since become dedicated to the more general issue of the relationship between intellectual property and the public interest. Its members have offered testimony before the Patent and Trademark Office and have supplied advisory and support services on various intellectual property issues. This is PIPLA's first *amicus* appearance.

The Union for the Public Domain (UPD), located in Washington, D.C., is an independent membership organization with the goal of protecting and enhancing the public domain in intellectual property matters. Founded in 1996, UPD is comprised of computer and software

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* Consent of all parties has been granted to file this brief of *Amici Curiae* in partial support of petitioners. Letters of Consent have been filed with the Clerk of this Court. No counsel for either party had any role in authoring the brief, and no person other than the named *amici* and their counsel made any monetary contributions to the preparation and submission of this brief.

[1] Several law student members of PIPLA helped to prepare this amicus brief: Marquetta Bryan, Jay Crook, Michael Dolan, Jr., Lisa Johnson, Angela Marshall, Edward R. Pekarek, Dawn Snyder, and Peter D. Traska.

experts, small businesses, students, professors, lawyers, librarians, and concerned Americans who seek common ground in order to provide a strong voice for the public's rights in intellectual property matters.

Amici are deeply concerned with both the effects of the Copyright Term Extension Act[2] (hereinafter referred to as the "Bono Act") on the public domain as well as with the disturbing circumstances under which it was created. This *Amici Curiae* brief is filed because of concern that the true policy of the Copyright Clause has been perverted. This distortion almost exclusively surrounds the retroactive portion of the bill. These *amici* believe that it is only the failure to distinguish retrospective from prospective term extensions when considering their respective constitutional bases that has kept the courts below from reaching the correct result in this case.

SUMMARY OF ARGUMENT

This case affords this Court a unique opportunity to do more by doing less. Judicial restraint generally impels this Court to decide only essential constitutional issues. Here the issues are uniquely situated so that the decision of only one issue – that of retrospective extensions – will do far more than merely defer the remaining issue of

[2] *The Sonny Bono Copyright Term Extension Act*, Pub. L. No. 105-298, 112 Stat. 2827 (1998). The Act retroactively increased the term of protection for existing copyright from seventy-five to ninety-five years for works-for-hire, and from life plus fifty to life plus seventy years for all other works, and did the same prospectively for future works.

prospective extensions, but will render that issue permanently beyond any need of judicial review.

If this Court decides that retrospective extensions are unconstitutional, it will not only be able to avoid deciding the other issue today of whether a prospective extension violates the "limited times" Constitutional provision[3] but will likely never have to decide that issue. Prospective copyright term extensions are reviewable only with great difficulty. Fortunately, however, the primary reason Congress has been urged to extend copyright terms is to obtain retrospective, not prospective, extension. By seizing this opportunity to declare only retrospective copyright extensions unconstitutional, this Court can remedy the distortion of the political process effected by its proponents. Congress will then be free to balance the competing concerns of incentives for authorship and a rich public domain, unburdened from constitutionally suspect demands that are inconsistent with the design of the Copyright Clause.

ARGUMENT

I. JUDICIAL RESTRAINT MILITATES AGAINST REVIEWING MORE OF A STATUTE THAN IS NECESSARY.

This Court has consistently placed a premium on restraint: "If there is one doctrine more deeply rooted

[3] U.S. CONST. art. I, § 8, cl. 8.

than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."[4] Moreover, this Court has underlined the fact that it is often not so much a question of refusing to decide but rather of deferring. "A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."[5] This Court avoids intrusion into the legislative process as much as possible. As the decision below asserts, "a court should avoid, not seek out, a constitutional issue the resolution of which is not essential to the disposition of the case before it."[6] These *amici* contend that the issue of copyright extension offers this Court a unique opportunity to choose the least intrusive approach, while at the same time resolving all of the larger issues involved in this profoundly important question.

Not only is this approach the most prudential, but it also reflects the same deferential restraint that this Court routinely applies to other areas. For instance, this Court declines review of federal questions decided by state courts resting on independent and adequate state

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[4] *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944).

[5] *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). This Court recently reiterated that logic: "[i]t is true that we have often stressed the importance of avoiding the premature adjudication of constitutional questions." *Clinton v. Jones*, 520 U.S. 681, 690 n. 11 (1997).

[6] *Eldred v. Reno*, 239 F.3d 372, 378 (D.C.Cir. 2001).

grounds.[7] The political question doctrine is another example of this restraint.[8] Similarly, this Court avoids constitutional bases where statutory construction serves the same goal because it preserves the delicate balance of power between the judiciary and legislative branches.[9] This Court's doctrines requiring cases and controversies, refusing moot questions, granting *certiorari* with selectivity, and most critical to the correct disposition of this case, severability, all serve the goals of preserving judicial resources and minimizing intrusion.

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[7] *Murdock v. City of Memphis*, 87 U.S. 590 (1874); *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487 (1965).

[8] *Baker v. Carr*, 369 U.S. 186 (1962). The Supreme Court has stated that, "[a]n Art. III court's resolution of a question that is 'political' in character can create far more disruption among the three co-equal branches of Government than the resolution of a question presented in a moot controversy." *Goldwater v. Carter*, 444 U.S. 996, 1005-06 (1979). Among the factors provided by this Court to discover whether a case involves a political question is when there are "a lack of judicially discoverable and manageable standards for resolving it," *Baker v. Carr*, 369 U.S. at 217. This certainly evokes the kind of difficulty posed by the question of appropriate copyright terms, although these *amici* do not believe this case involves a truly political question.

[9] It is settled doctrine that the Supreme Court "will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided." *U.S. v. Clark*, 445 U.S. 23, 27 (1980). This maxim of construing acts of Congress to avoid Constitutional questions is based both on a desire to avoid premature adjudication of constitutional issues, and on the belief that in areas where legislation might intrude on constitutional guarantees, Congress would err on the side of those constitutional liberties. *Regan v. Time, Inc.*, 468 U.S. 641, 697 (1984).

Rather than constraining this Court, the principle of judicial restraint underlying all the doctrines discussed above can lead this Court to a resolution of this case that establishes clear copyright doctrine and restores the precise Constitutional balance demanded by the Copyright Clause. Although copyright terms are not unreviewable, it is primarily a Congressional task to discern the prospective copyright terms that best promote progress. A court would be hard pressed to decide *ipso facto* whether seventy-five or ninety-five years is the optimum term to balance the societal need for access to the public domain with that of a sufficient incentive for authors to create. Of course, at some point Congress might be urged to enact a coypright term which for all practical purposes is unlimited and therefore violates the Copyright Clause. However, there is no need whatsoever to conduct that review in this case. If Congress is firmly and unequivocally prohibited from hereafter granting retrospective extensions, these *amici* submit that it will not likely have cause to violate the Constitution again.

II. BUT FOR RETROSPECTIVE EXTENSION THERE WOULD HAVE BEEN NO CONGRESSIONAL INTEREST IN TERM EXTENSION

The Bono Act's legislative history reveals the unarguable truth that, were it not for retrospective extension, no extension would have been enacted at all.[10] That is,

[10] A detailed summary of how all the proponents of copyright term extension were interested solely in retrospective extension can be found in, Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"* 52 FLA. L. REV. 989, 996-1002 (2000).

although the resulting extension was for both retrospective and prospective terms, only retrospective extension motivated those supporting the Bono Act. And this makes economic, although certainly not constitutional, sense.

Economic realities explain that there is simply not enough present value in any prospective extension to justify serious interest in such extensions and, indeed, that is why those benefiting from retrospective extension were the chief proponents of extension in the first place. The present value of the additional twenty years of copyright exclusivity granted by prospective extension adds less than a microscopic one-tenth of one per cent to the expected cash flow during an initial fifty year term.[11] It defies logic to conclude that any sound business practice would include deploying substantial resources to secure such a poor investment. Compare this, however, to the immediate returns of billions of dollars of profit guaranteed by retrospective extension[12] and it becomes obvious how the failure to impose constitutional limits upon retrospective extensions distorts the democratic process.

These *amici* do not deny that there are other reasons that copyright term extension might be demanded – in this case, for instance, advocates of global harmonization

[11] Dean Hal R. Varian Aff. at 8-9, Appendix to the record filed in the appeal from the United States District Court for the District of Columbia at A 64-67.

[12] The Disney investment in the "Winnie the Pooh" characters will apparently yield more than one billion dollars per year, for which Disney paid about $350 million. *Disney Buys the Rights to Winnie the Pooh*, N.Y. TIMES, March 5, 2001, at C12.

argued that the difference between U.S. terms and some (but, notably, hardly all) foreign terms meant that U.S. authors enjoyed less exclusivity than others overseas.[13] The Court of Appeals concluded that the Bono Act achieved harmonization with European Union copyright standards and that such standardization of terms is a valid exercise of an enumerated Congressional power,[14] without questioning whether there was a less intrusive way of accomplishing this without constitutional damage. However, the argument that harmonization required retrospective extension is simply wrong, because prospective extension can accomplish the same result, although over a longer period of time.

While these *amici* do not accept that such foreign considerations should dictate U.S. copyright interests, they nevertheless believe that Congress is most competent to decide that issue if confined to a constitutionally valid prospective treatment. Congress must have the

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[13] The reasons for this go beyond the interests and arguments of these *amici*, but an international copyright law doctrine, the rule of the shorter term, allows countries to apply the foreign country term to foreign authors, where that term is shorter than the protecting country. *Berne Convention for the Protection of Literary and Artistic Works*, Art. 7(8), Sept. 9, 1886, and later revisions. The rule of the shorter term is actually an exception to the general international copyright law doctrine of national treatment which would otherwise give foreigners all the benefits that nationals receive. Prior to the present extension, because some countries applied a lifetime plus seventy-year term, American works received only their lifetime plus fifty-year term under the rule of the shorter term. EU Directive of Oct. 29, 1993, 93/98/EEC, O.J. 1993 No.L 290.

[14] *Eldred v. Reno*, 239 F.3d 372, 379 (D.C. Cir. 2001).

opportunity to assess that question in a fair and impartial democratic manner, untainted by the arguably illegitimate lobbying demands of corporate advocates for unconstitutional retrospective extension. Should Congress be convinced that longer prospective terms are desirable in furtherance of the progress of expressive works and without the specter of monied lobbying interests, it can assuredly be trusted to decide the matter. And notably, if Congress decides to reject such an extension, it could have important global ramifications such as encouraging foreign countries to re-examine the merits of grossly extended copyright terms.

It is difficult to exaggerate the mischief caused by those seeking retroactive extension. One of the most influential supporters of the Bono Act was the Walt Disney Corp., which had acquired the rights to the "Winnie the Pooh" characters.[15] In its purchase agreement, Disney made its obligations contingent upon the successful passage of the Bono Act retrospective extension, much like a potential home buyer who includes a mortgage financing contingency clause. Treating Congress as if it were one's private banker vividly demonstrates the growing hazards of allowing copyright terms to escape their constitutional bounds. This potential mischief was illustrated in its most extreme form when Sonny Bono's widow (while serving the remainder of his term), stated upon presentation of the bill:

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[15] Jon M. Garon, *Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 600 (1999).

> Actually, Sonny wanted copyright to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all ways available to us. As you know, there is also Jack Valenti's proposal to last forever less one day. Perhaps the committee may look at that next Congress.[16]

These *amici* recognize that retroactive extensions are not unusual, but they do not believe that should deter this Court from finding them constitutionally flawed. It is true that, as the Court of Appeals noted, every past copyright term extension has extended subsisting as well as future terms, a progression which these *amici* believe has now reached proportions which demand the present review.[17] When the 1976 Copyright Act was enacted, the terms of works under the earlier 1909 Act were all extended from a maximum of fifty-six to the seventy-five years that the new Act applied to all non-works-for-hire.[18] Retrospective extensions, although on a smaller scale, also occur in patent law. The extension of existing patent terms by the passage of private legislative bills has become somewhat controversial.[19] And, of course, many of the same arguments about the Bono Act would certainly apply to those private bills: the drugs have already

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[16] 144 CONG. REC. H9951 (daily ed. Oct. 7, 1998) (remarks of Rep. Bono).

[17] *Eldred v. Reno*, 239 F.3d 372, 374 and 379 (D.C. Cir. 2001).

[18] 17 U.S.C.A. §§ 303 and 304.

[19] *See*, Robert Patrick Merges and Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45 (2000).

been invented, for instance, and an increased term does not serve to promote progress with respect to an already-invented drug.

However, despite the similarities, previous copyright extensions and the private bills extending patent terms are markedly different from the Bono Act, at least for purposes of this appeal. It has been over a quarter century since the 1976 Act was enacted. Unlike the Bono Act, many have relied on those extensions and, fortunately, those terms are either on the cusp of expiration or have already expired, rendering the question essentially moot. By the same token, extensions of patent terms for at least some pharmaceuticals are often sought because of other very different, and arguably legitimate circumstances (e.g., FDA approval). Thus, there is no reason to assume, without more, that invalidating the Bono Act would automatically invalidate private patent extension bills. Surely, at a minimum, that question can await its own hearing.

If Congress is afforded the chance to consider the question of prospective term extensions unsullied by illegitimate pressures for retroactive extension, it may actually decide to shorten rather than extend copyright terms. This is especially true in a world where functional works such as computer programs have only recently been afforded copyright protection, and where such works routinely and predictably become antiquated well prior to the end of their copyright terms.[20]

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[20] Computer software becomes obsolete within ten years and many programs must be upgraded approximately every three years. *See*, Charles N. Faerber, *Book Versus Byte: The Prospects and Desirability of a Paperless Society*, 17 J. MARSHALL J.

III. THIS CASE INVOLVES ONLY ONE QUESTION THAT DEMANDS REVIEW: RETROSPECTIVE TERM EXTENSION

Petitioners seek to have both aspects of the Bono Act, retrospective and prospective extension, declared unconstitutional. These *amici* believe that certain unique features of this case would allow this Court to effectively address both issues by directly addressing only one – retrospective extension.

This case therefore presents a truly unique opportunity to exercise judicial review and judicial restraint at the same time, in a perfectly balanced symbiotic manner. The dynamic between prospective and retrospective copyright term extensions presents an ideal situation where this Court can declare part of a statute unconstitutional while at the same time it will increase the autonomy and legitimacy of Congress to decide the remaining issue.

Retrospective extension cannot possibly serve to promote the progress of expressive original works of authorship by offering the incentive of a term increase to an

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COMPUTER & INFO. L. 797, 813 (Spring 1999). Compare the *Semiconductor Chip Protection Act* where Congress has recognized the volatility and the shorter usefulness of the semiconductor chip mask works by choosing a ten-year protection period over copyright's substantially larger periods. 17 U.S.C. § 904(b). *See also*, Leo J. Raskind, *Symposium: The Future of Software Protection: The Uncertain Case for Special Legislation Protecting Computer Software*, 47 U. PITT. L. REV. 1131, 1134 (Summer 1986), which argues a term more comparable to the *Semiconductor Chip Protection Act* should be applied to software protection.

author, or his or her assigns, *post hoc*.[21] Prospective extension, however, is a considerably more difficult matter because it is not so much the promotion of progress, but rather the "limited times" portion of the Copyright Clause that is at issue. Both the District Court and Court of Appeals faced this problem: how long is too long? Both courts seem to have answered to a greater or lesser degree that they are uncertain, with the Court of Appeals ostensibly suggesting that the matter was essentially not justiciable and that the Copyright Clause offers no cognizable legal limits whatsoever.[22]

These *amici* believe that it is the very difficulty in determining what is a "limited time" that has needlessly

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[21] The logic used by the Court of Appeals and Congress to justify the *Bono Act* is inconsistent with the decision of this Court in *U.S. v. Lopez*, 514 U.S. 549 (1995). In *Lopez*, this Court noted that just because Congress concluded that a given piece of legislation serves a constitutional purpose, "does not necessarily make it so." *Id.* at 557, n. 2 [quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in judgment)]. In limiting the power of Congress to legislate under the Commerce Clause, the Court took note of the source of the power itself. "[L]imitations on the commerce power are inherent in the very language of the Commerce Clause." *Id.* at 553. The contention by Congress and the Court of Appeals that the creation of extra income can "promote progress" by leading to the creation of more works and the preservation of existing works smacks of the same overextended rationale as was flatly rejected in *Lopez*.

[22] The appellate court felt bound by its "holding in *Schnapper v. Foley*, 667 F.2d 102, 112 (1981), in which [it] rejected the argument 'that the introductory language of the Copyright Clause constitutes a limit on congressional power.' " *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001).

complicated this case. The courts below deemed, wrongly, these *amici* would suggest, that the case dealt with little more than the issue of limited times.[23] Had the issues of prospective and retrospective extension been clearly distinguished below, *amici* believe the lower courts could have seen that, although prospective extensions may pose an apparently impenetrable question, it is one that need not be answered now and perhaps need never be answered.

In light of the fact that prospective extensions are more effectively controlled – if at all – by the "limited times" portion of the Copyright Clause, a decision invalidating copyright extension on that ground could well create an ongoing obligation by this Court to oversee future Congressional extensions. But the Bono Act is the culmination of a habit of copyright term extensions in which retrospective and prospective portions were inextricably and unconstitutionally entangled. By holding that retrospective extension alone is unconstitutional, and that the two sections of the Bono Act are inseverable, this Court can safely leave prospective extension to future Congressional consideration.

IV. THE RETROSPECTIVE AND PROSPECTIVE PORTIONS OF THE BONO ACT ARE NOT SEVERABLE

If this Court accepts the conclusion that the retrospective portions of the Bono Act are indeed unconstitutional, the final question is whether the remaining

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[23] *Eldred*, 239 F.3d at 378-379.

portions of the Act can stand alone. Generally, courts do not review and invalidate any more of a Congressional enactment than necessary.[24] "The standard for determining the severability of an unconstitutional provision is well established: 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independent of that which is not, the invalid part may by dropped if what is left is fully operative as a law.' "[25] This Court's most recent articulation of the standard for severing federal statutory provisions retains the necessary condition that to save a portion of an otherwise unconstitutional statute, this Court must find that Congress would have otherwise enacted the remainder of the legislation without the unconstitutional portion. "The unconstitutional provision must be severed unless the statute created in its absence would not have been enacted."[26] This Court's severability standard defers to the judgment of Congress as much as possible, and focuses the inquiry on legislative intent.[27]

Congressional intent may be gleaned from the language and structure of the legislation and from its history.[28] Intent is clear when there is a severability clause; there is no such clause in the Bono Act. "In the absence of

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[24] *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion).

[25] *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987), quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932).

[26] *Alaska Airlines*, 480 U.S. at 685.

[27] *Id.* at 685-86.

[28] *Id.* at 687.

a severability clause . . . Congress' silence is just that – silence – and does not raise a presumption against severability."[29] It is highly unlikely that Congress would have passed any copyright reform at all in 1998 were it not for those who sought relief from the threat of imminently expiring copyrights. Simply, there would have been no prospective extension of copyright protection but for those seeking the unconstitutional provisions. Because the legislative history leaves no doubt that the Bono Act would not have been enacted at all but for its retrospective extension provisions, the prospective provisions may not be severed from the law. The prospective portions of the Bono Act fail to meet the condition of this Court's severability test[30] and accordingly must also be struck.

The prudential advantage of solely invalidating retrospective copyright is that it unburdens Congress, within its constitutionally mandated discretion, to extend or shorten the copyright term in accordance with the democratic process. This Court can be confident that the political process, instead of continuous judicial review, will supply effective oversight. Moreover, it is only the allure of retroactive extension and the undue lobbying influence it invites that has to date perverted the process.

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[29] *Id.* at 686.

[30] A more complete explanation of why the retrospective and prospective portions of the *Bono Act* are not severable can be found in, Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"* 52 FLA. L. REV. 989, 1032-36 (2000).

CONCLUSION

With its generally restrained posture, this Court has suggested that where judicial review is concerned, less is more. While it seems clear that retrospective extension violates the promotion of progress principle underlying the Constitution's Copyright Clause, it is more debatable whether the additional twenty years the Bono Act added prospectively to copyright terms clearly violates the Constitutional limited terms provision. These *amici* believe that this Court can constructively avoid deciding that more vexing issue by finding only the retrospective extension unconstitutional. Because the two provisions are not severable under the *Alaska Airlines* test, this Court can allow Congress to revisit the issue of prospective extension.

This Court can safely leave the more problematic issue of prospective extension to Congress once it no longer serves as the stalking-horse of what can only be called an overly grasping copyright strategy. Well-funded but constitutionally flawed interests have overwhelmed Congress and distorted copyright policy, allowing for the passage of one retroactive extension after another in defiance of the Constitution. Allowing Congress in its discretion to adopt sound copyright policy – as it goes about adjusting the copyright term to optimize progress of expressive works, but not to serve as an ill-gotten windfall to authors of past works – in circumstances free of those constitutionally damaging interests, will ensure

that this Court is not asked to decide again what constitutes an appropriate copyright term.

Respectfully submitted,

PROFESSOR MICHAEL H. DAVIS, ESQ.
Counsel of Record
CLEVELAND STATE UNIVERSITY
College of Law
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-2228